IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
BARBARA BREUER	:	NO. 97-0082-02

MEMORANDUM AND ORDER

HUTTON, J. September 12, 1997

Presently before the Court are the Defendant Barbara Breuer's Motion for Judgment of Acquittal and for a New Trial, the Government's memorandum in opposition, and the Defendant's memorandum in reply thereto.

I. BACKGROUND

After a jury trial, Defendant, Barbara Breuer ("Breuer"), was convicted on one charge of willfully failing to file a tax return for the year 1993 in violation of 26 U.S.C. § 7203. In the present motion, Breuer argues that she is entitled to a judgment of acquittal on Count Eight of the Information[1] on

[1] Count Eight reads:

COUNT EIGHT

THE UNITED STATES ATTORNEY FURTHER CHARGES THAT:
1. AT ALL TIMES MATERIAL TO THIS INFORMATION, DEFENDANT **BARBARA BREUER** EARNED SUBSTANTIAL INCOME AS A GYNECOLOGIST AND A PARTNER IN WIDZER, O'SHEA, AND CONNOLLY, IN NORRISTOWN, PENNSYLVANIA. 2. DURING THE CALENDAR YEAR 1993, IN THE EASTERN DISTRICT OF PENNSYLVANIA, THE DEFENDANT BARBARA BREUER, A RESIDENT OF THE EASTERN DISTRICT OF PENNSYLVANIA, HAD AND RECEIVED GROSS INCOME OF APPROXIMATELY $218,694.11 AND BY REASON OF SUCH INCOME SHE WAS REQUIRED BY LAW, FOLLOWING THE CLOSE OF CALENDAR YEAR 1993 AND ON OR BEFORE APRIL 15, 1994, TO MAKE AND FILE AN INCOME TAX RETURN TO THE DISTRICT DIRECTOR OF INTERNAL REVENUE FOR THE INTERNAL REVENUE DISTRICT OF PHILADELPHIA, EASTERN DISTRICT OF PENNSYLVANIA; OR TO

(continued...)

three grounds: (1) there was insufficient evidence of willfulness as to the 1993 tax year; (2) the verdict of willfull failure to file a 1993 return was contrary to the weight of the evidence; and (3) the government's failure to preserve and disclose Revenue Agent Patricia Berretta's rough notes of three telephone conversations with the Defendant "amounted to such an extreme violation of the government's obligations under Rule 16, Rule 26.2, Brady, and the Jencks Act, as to require the entry of a judgment of acquittal." (Def.'s Mot. for Judgment of Acq. and for a New Trial at 10). Alternatively, Breuer argues she is entitled to a new trial on four grounds: (1) the Government's nondisclosure of the Berretta notes requires a new trial; (2) the Court erred in declining to charge the jury on the defense theory of the case; (3) the Court erred in giving the jury a supplemental "modified" Allen charge; and (4) the Court erred in charging the jury with the Government's "Deliberate Ignorance" instruction. Id. at 14-21. For the foregoing reasons, the Defendant's Motion is Denied both as to judgment of acquittal and a new trial.

II. Motion for Judgment of Acquittal

[1](...continued)
THE DIRECTOR, INTERNAL REVENUE SERVICE CENTER, MID-ATLANTIC REGION, PHILADELPHIA, PENNSYLVANIA; OR TO ANY OTHER PROPER OFFICER OF THE UNITED STATES, STATING SPECIFICALLY THE ITEMS OF HER INCOME AND ANY DEDUCTIONS AND CREDITS TO WHICH SHE WAS ENTITLED; AND THAT KNOWING ALL THESE FACTS, SHE DID WILLFULLY AND KNOWINGLY FAIL TO MAKE AND FILE AN INCOME TAX RETURN TO THE DISTRICT DIRECTOR OF INTERNAL REVENUE, TO THE DIRECTOR OF THE INTERNAL REVENUE SERVICE CENTER, OR TO ANY PROPER OFFICER OF THE UNITED STATES.
IN VIOLATION OF TITLE 26, UNITED STATES CODE, SECTION 7203.

Breuer first makes three arguments that she is entitled to a post-verdict judgment of acquittal under Rule 29© of the Federal Rules of Criminal Procedure. These will be considered in turn.

A. Sufficiency and Weight of the Evidence[2]

The Defendant first argues that the Government produced insufficient evidence of willfulness to support a verdict against her. Failing that, she argues that--as to willfulness--the verdict was contrary to the weight of the evidence. (See Def.'s Mot. at 10-11).

Under Rule 29(c), a Court may order entry of a judgment of acquittal if it finds as a matter of law that "the evidence is insufficient to sustain a conviction of such offense or offenses." Fed. R. Crim. P. 29(a). This standard is highly deferential to the factfinding role of the jury. The Court does not weigh the evidence, but determines whether the Government has proffered sufficient evidence on each element of the offense to support the verdict. See United States v. Giampa, 758 F.2d 101, 106 (3d Cir. 1985). It is well established that the Court may not disturb a jury verdict unless, taking the view most favorable to the Government, there is no substantial evidence to support it. See Glasser v. United States, 315 U.S. 60, 80 (1942);

[2] Because the Defendant does not make a separate argument that the verdict was contrary to the weight of the evidence, the Court will consider both arguments together in this section.

United States v. Anderson, 108 F.3d 92, 93 (3d Cir. 1997). A Rule 29© motion may not be granted if "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Coleman, 862 F.2d 455, 460 (3d Cir. 1988) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in original). Therefore, in considering the present Motion, the Court may set aside the jury's verdict only if it finds that no rational jury could conclude that the defendant committed the crimes charged beyond a reasonable doubt. United States v. Ashfield, 735 F.2d 101, 106 (3d Cir.), cert. denied, 469 U.S. 858 (1984).

The crime of willfully failing to file a federal income tax return has three elements: (1) the presence of a duty to file a federal income tax return; (2) failure to file the return; and (3) willfulness. See 26 U.S.C. s. 7203 (1994); United States v. Crocker, 753 F. Supp. 1209, 1212 (D.Del. 1991) (Roth, J.). Breuer disputes neither her duty nor her failure to file in the present case. Instead, Breuer contends that the Government failed to make out its required proof that she acted willfully beyond a reasonable doubt. (See Def.'s Mot., at 10-11).

Under s. 7203, a defendant acts willfully if she commits a "voluntary, intentional violation of a known legal duty." Cheek v. United States, 498 U.S. 204, 201 (1991). The Government offered evidence that the Defendant was an educated professional,(Tr. at 72-73 (6/2/97) (Widzer)), with a substantial

annual income during the relevant period,(Tr. at 87-108 (6/2/97) (Widzer)), who had filed timely tax returns in previous years,(Tr. at 125-128 (6/2/97) (Rodgers)). It offered evidence that she attended monthly meetings at her medical practice partnership to discuss financial matters. (Tr. at 79-80 (6/2/97) (Widzer)). It further produced evidence that she attended annual partnership meetings where an accountant was present and both partnership and individual tax issues were discussed, and received copies of K-1 tax forms intended to assist the partners in filing their individual federal income tax returns. (Tr. at 83-85 (6/2/97) (Widzer)).

The Government also offered the testimony of Revenue Agent Patricia Berretta ("Berretta"), who was assigned to the Defendant's case. It showed that Agent Berretta had contacted the Defendant and her husband, Daniel Breuer, by telephone on numerous occasions between July, 1993 and February, 1994 to discuss their failure to file tax returns for the years 1990 to 1992. She testified that she twice met with Daniel Breuer: on November 3, 1993 and February 2, 1994. (Tr. at 58-59, 67 (6/3/97) (Berretta)). Further, Agent Berretta testified that on three occasions she spoke with the Defendant Barbara Breuer over the telephone and specifically informed her that the Defendant and her husband had not filed tax returns for the years 1990 through 1992, and that Berretta was seeking those returns. (Tr. at 53-67 (6/3/97) (Berretta)). Finally, the Defendant admitted on cross-examination that during the years charged in the criminal

information she knew she was required to file tax returns, without regard to her husband's income. (Tr. at 85-90 (6/4/97) (Berretta)).

Considering the above evidence, the Court cannot find that the evidence offered was insufficient to support the jury's verdict as to willfulness. Here, a rational juror could easily conclude that the Defendant was aware of her obligation to file a federal income tax return by April 15, 1994--the year charged in Count Eight of the information--and voluntarily and intentionally failed to do so.

Likewise, the jury's finding is not contrary to the weight of the evidence. Although the Defendant asserts in her Motion that "the scant evidence of wilfulness was far outweighed by other, entirely exculpatory evidence," she fails to identify any overwhelming exculpatory evidence. (See Def.'s Mot. at 11). The Defendant's only exculpatory evidence as to willfullness was her testimony that her husband so exclusively handled family financial and tax matters that she was unaware of his failure to file the returns. (Tr. at 44-46, 58-64, 74-75 (6/4/97) (Breuer)). This evidence was by no means overwhelming, and the jury was entirely within its discretion to accept or discount it in view of its determination of the credibility of the witness. Making all inferences in favor of the Government, as the Court must, it does not appear that the jury's verdict was against the weight of the evidence.

B. Failure to Preserve and Disclose Rough Notes

The Defendant next argues that the Government's failure to preserve and disclose Agent Berretta's rough notes of her three telephone conversations with the Defendant constituted a violation of Federal Rule of Criminal Procedure 16, Federal Rule 26.2 and the Jencks Act, 18 U.S.C. s. 3500 (1994), and the affirmative disclosure requirements of Brady v. Maryland, 373 U.S. 83 (1963), and its progeny.

1. Agent Berretta's Steno Notes

In her Motion, Breuer argues that she was prejudiced by the Government's failure to disclose the existence and destruction of "steno notes" that Agent Berretta made after her three telephone contacts with the Defendant. (See Def.'s Mot. at 5). Defendant asserts that with these notes she would have more effectively impeached Agent Berretta, the Government's main witness as to the element of willfullness. (See Def.'s Reply at 2-4). Defendant further cites United States v. Ramos, 27 F.3d 65 (3d Cir. 1994), and other Third Circuit cases for the proposition that the mere fact of the Government's failure to preserve and disclose the steno notes requires a judgment of acquittal in this case. (See Def.'s Mot. at 11-14; Def.'s Reply at 4). A review of the role the missing steno notes played in the trial and the relevant case law indicates that the Defendant's position is without merit.

As part of its proof of willfullness, the Government offered Agent Berretta's testimony that in three separate telephone contacts she had notified the Defendant of her failure to file the relevant tax returns. (Tr. at 53-68 (6/3/97) (Berretta)). Agent Berretta first testified that on September 15, 1993, she called the Defendant's house and spoke with her to schedule a September 29 appointment to obtain the Breuers' tax returns. The Agent testified as follows:

> Q: Any why did you--what did you tell Mrs. Breuer was the reason for the appointment relevant to this case?
>
> A: Well, we did not have tax returns for the years said, and I was trying to in--you know, secure them so that--
>
> Q: Relevant to this case what years did you tell her the IRS did not have tax returns?
>
> A: 1990, 1991, and 1992.
>
> Q: What was Mrs. Breuer's response to that on September 15th, 1993?
>
> A: There was no response.

(Tr. at 53-55 (6/3/97) (Berretta)).

Second, Agent Berretta testified that on December 15, 1993 she called the Defendant at her office, leaving a message that Patricia Berretta from the IRS had called. (Tr. at 60 (6/3/97) (Berretta)). Later that day, the Defendant returned the call, and the Agent again informed her of the unfiled tax returns and sought to arrange an appointment. The Agent testified:

> Q: Be specific. Tell the jury what demeanor you had over the phone and what you told her?
> ...
> THE WITNESS: I told her that I was trying to secure the tax returns that had not been filed and, you know, could she help me out more or less and, you know, get in touch with her husband, you know, the two of them get together and please get me the returns.

(Tr. at 61-2 (6/3/97)).

Finally, on February 2, 1994, after neither of the Breuers showed up for a previously scheduled appointment that morning, Agent Berretta called the Breuers' residence and spoke with the Defendant a third time. The Agent testified:

> Q: What did you say to her? How did you identify yourself?
>
> A: Hello, this is Patricia Berretta, I'm calling from Internal Revenue and, you know, is this Mrs. Breuer? And we talked a bit--
>
> Q: What did she say in response to that?
>
> A: Yes, this is Mrs. Breuer. And I just said that, you know, I'm waiting for, you know, to show up at this appointment. We had an appointment scheduled for today, and no one is here and some--you know, are you coming in?
> She said her husband had left for the appointment. That was--she had just, you know, seen him before he left and that she was going to try and locate him for me. And basically that's what happened.
> She located him for me because--
>
> Q: Well--
>
> A: --two hours later he showed for the appointment.

(Tr. at 66-7 (6/3/97) (Berretta)).

On cross examination, counsel for the Defendant elicited that in addition to her contemporaneous handwritten time report and subsequent typewritten criminal referral report--both produced to the defense--Agent Berretta had taken down contemporaneous handwritten notes of the phone contacts in her steno book. (Tr. at 94-5 (6/3/97) (Berretta)). Berretta stated that her practice was to jot down "a quick note to myself" on the time sheet and later take down additional notes in the steno book. (Tr. at 94-5 (6/3/97)). She testified that the steno notes "more or less had more details" than the handwritten time report, but had been misplaced or destroyed in the intervening

years as a result of two office moves.[3] However, Agent Berretta testified that she had transferred the information in the steno book into her typewritten criminal referral when she made the referral in June, 1994. (Tr. at 91-2 (6/3/97)).

Berretta further stated on cross that her present testimony was from her recollection of the telephone conversations, independent of any notes:

> Q: Now, are those telephone conversations as to which you had a recollection independent of your notes, or are you able to recall those only because you've been reviewing this summary you have in front of you in preparation of this case?
>
> A: No. Actually I recall them because they're [sic] were only a few and I was frustrated during this time, and I--Mrs. Breuer was very nice on the phone, Dr. O'Shea was very nice on the phone, but I recall them because there were so few.
>
> And I know when I did speak to her, especially on December 15th and on February 2nd, I was very frustrated and wanted her to realize what was going on to make sure because she never showed for the appointments with her husband.
>
> Q: I'm sorry. Are you finished?
>
> A: So I wanted to make sure and that's how I definitely recall my conversations with her .

(Tr. at 111-12 (6/3/97) (Berretta)).

The Defendant was, however, able to offer evidence to contradict Berretta's testimony as to the three phone contacts. First, counsel for the Defendant cross-examined Berretta as to inconsistencies between the contemporaneous handwritten notes in her time report, her subsequent typewritten criminal referral and present testimony, eliciting that Berretta made no notes in her contemporaneous time sheet of specifically informing the Defendant of her failure to file the tax returns. (Tr. at 119-27

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[3] The Defendant does not question the good faith of either Agent Berretta or the prosecution in losing the notes and possibly permitting them to be destroyed. (See Def.'s Mot. at 6 n.7).

(6/3/97) (Berretta)). Second, in her own testimony, the Defendant specifically contradicted Berretta. On direct, Breuer claimed with respect to the September 15, 1997 phone contact: "I just--I don't know exactly what it was about. I did understand that there was a concern about taxes, but I didn't understand exactly what the--the problem was." (Tr. at 52 (6/4/97) (Breuer)). On cross examination, the Defendant further contradicted Berretta's account of phone contacts:

> Q: Now, did Revenue Agent Berretta in any of your three telephone conversations which took place between the time period of September, 1993, and February of 1994, ever tell you that no tax returns were filed by you or your husband for the tax years 1990, 1991, and 1992?
>
> A: No, she did not.
>
> ...
>
> Q: Did Agent Berretta ever tell you during any of the three conversations that you had with her between September of 1993 and February , 1994, that she was trying to get the income tax returns for 1990, 1991, and 1992?
>
> A: I did not come away from any of those phone conversations thinking that was the case. Had it been, I would have been there, and this problem would never have gotten to this level.

(Tr. at 90 (6/3/97) (Breuer)).

When counsel for the Government pressed her what she meant by not "coming away" from the second conversation with the impression that no tax returns had been filed for 1990, 1991, and 1992, the Defendant testified:

> Q: Did she tell you that?
>
> A: I don't recall her telling me that, no.
>
> Q: Is it you don't recall her telling you that today, or is it possible that she did tell you that and you just don't remember today?

A: I don't believe it was said in that way to me, no, I don't.

(Tr. at 92 (6/4/97) (Breuer)).

Therefore, at trial Agent Berretta's steno notes did not play the dramatic role that the Defendant suggests. Berretta testified to the events from present recollection, and did not rely on the missing notes. There is no indication that the notes contained any additional impeachment material.[4] In any case, the defense cross-examined the Agent extensively on this point, and offered the Defendant's testimony to contradict her. Finally, it should be noted, it was not at all necessary to the Government's case that it prove Berretta specifically informed the Defendant of the unfiled returns. From the evidence presented, the jury could have found that the Defendant was on notice of the tax violation from the fact of Agent Berretta's persistent inquiries alone. Berretta's testimony, then, was only a more direct proof that the Defendant was on notice, where circumstantial proof was sufficient. On this background, therefore, it is evident that the unintentional loss or destruction of Agent Berretta's steno notes did not prejudice the Defendant in this trial.

2. <u>Rule 16 Disclosure</u>

The first issue is whether, as the Defendant contends, Agent Barretta's missing or destroyed rough notes were

[4] At best for the Defendant, Berretta's notes might have contained no mention that the Agent specifically informed the Defendant of the unfiled returns. At worst, they might corroborate the Agent's testimony that she did specifically inform the Defendant.

discoverable under Rule 16 of the Federal Rules of Criminal Procedure.

Two potential avenues for disclosure under Rule 16 might arguably apply to this case. First, under Rule 16(a)(1)(A), the Government must disclose any statement by the defendant, including: any relevant written or recorded statement made by the defendant, any written record containing the substance of any oral statement made in response to interrogation by a government agent, and any relevant grand jury testimony by the defendant. Second, Rule 16(a)(1)(C) requires that the Government disclose all documents or tangible objects that are material to the preparation of the defendant's defense, intended for use by the government as evidence in chief at the trial, or obtained from or belong to the defendant. The determination of what material falls within the scope of Rule 16 is within the sound discretion of the trial judge. See United States v. Fiorvanti, 412 F.2d 407, 410 (3d Cir. 1969).

In the present case, Agent Berretta's steno notes were neither "statements made by the Defendant" nor records "containing the substance of any oral statement" by the Defendant under Rule 16(a)(1)(A). Instead, Berretta testified that the notes recorded the fact of the telephone conversations, and the essence of the Agent's own statements.[5] Further, the notes were

[5] United States v. Molina-Guevara, 96 F.3d 698, 705 (3d Cir 1996), which Defendant cites, is inapposite. In Molina-Guevara, the Third Circuit found that a government agent's handwritten notes of her post-arrest custodial interrogation of the defendant were producible under Rule 16. See id. at 700, (continued...)

not discoverable under Rule 16(a)(1)(C). The notes were not material to the preparation of the defendant's defense because the Defendant was able to cross-examine Berretta effectively with the materials actually produced and contradict her with the Defendant's own testimony. In any case, it is pure speculation that the notes contained any impeachment material. See United States v. Flecha, 442 F. Supp. 1044, 1047 (E.D.Pa. 1977) (rejecting defendant's claim of Rule 16 violation where it was doubtful that the defendant would have benefitted from the evidence in question). Similarly, the notes did not in any sense belong to the Defendant, and were not intended by the Government for use in its case in chief at trial. See Fed. R. Crim. P. 16(a)(1)(C). Therefore, the steno notes were not discoverable under Rule 16.

Even if the steno notes would have been discoverable under Rule 16, the Court finds that the Government could not produce the notes because they did not exist as of the time they were requested. In her Motion, the Defendant concedes that the Government acted in good faith with respect to the notes. (See Def.'s Mot. at 6 n.7). The Court agrees, and finds that the Government complied in good faith with the Defendant's relevant discovery requests. See United States v. Ramos, 27 F.3d 65, 69

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[5](...continued)
705. The Molina-Guevara notes recorded the substance of a highly material oral statement by the defendant--the defendant's lies about her name and her role in the drug transaction. See id. at 700. In the present case, the Court finds Agent Berretta's steno notes were not statements of the Defendant, and in any case were not material to the case.

(3d Cir. 1994) (adopting good faith and harmless error defenses to government destruction of evidence).

3. Jencks Act and Rule 26.2

The Defendant next contends that she was entitled to receive the steno notes under the Jencks Act, 18 U.S.C. s. 3500 (1994) and Rule 26.2 of the Federal Rules of Criminal Procedure.

Rule 26.2 and the Jencks Act require the Government to produce to the defense, in time for use in cross-examination, "any statement ... of the witness in [its] possession ... which relates to the subject matter as to which the witness has testified." 18 U.S.C. s. 3500(b).[6] The Defendant argues that the steno notes were "statements" of Agent Berretta, required to be disclosed for her use in cross-examination.

The Jencks Act defines a "statement," in relevant part, as:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; [or]
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement.

[6] Rule 26.2, which was promulgated to place the substance of the Jencks Act into the Federal Rules of Criminal Procedure, see Fed. R. Crim. P. 26.2, Advisory Committee Notes, contains almost identical language, requiring the Government to produce "any statement of the witness that is in [its] possession and that relates to the subject matter concerning which the witness has testified." Fed. R. Crim. P. 26.2(a).

18 U.S.C. s. 3500(e).[7] The Court finds that the missing steno notes were not "statements" within the meaning of the Jencks Act and Rule 26.2.

In United States v. Ramos, 27 F.3d 65, 70 (3d Cir. 1994), the Third Circuit faced the issue of whether the destroyed rough notes of government agents constituted Jencks Act materials when the agents themselves took the stand as witnesses. The agents took the notes in the course of interviews with co-conspirators who co-operated pursuant to plea agreements. Id. at 67. Later, the agents destroyed some of those notes after preparing formal summary reports. Id. Although it chastised the agents for destroying the notes, the Court determined that the destroyed notes were not "statements" of the agents within the meaning of the Jencks Act because they were neither "substantially verbatim recitals" of anything the agents said, nor writings that the officers later "adopted" in any way. Id. at 70 (citing United States v. Griffin, 659 F.2d 932, 937 (9th Cir. 1981) (finding destroyed interview notes of U.S. Department of Labor civil compliance officers not Jencks "statements" with respect to testifying agents)). Therefore, the Court found that the destruction of the interview notes did not constitute a violation of the Government's obligations under the Jencks Act.

In the present case, the steno notes are even more clearly not Jencks "statements." On cross-examination, Agent

[7] Again, Rule 26.2's definition of a "statement" is nearly identical. See Fed. R. Crim. P. 26.2(f).

Berretta testified that it was not her practice to conduct substantive interviews over the telephone. (Tr. at 118-19 (6/3/97) (Berretta)). Instead, the steno notes were incomplete records of facts, and of the existence of the telephone contacts themselves. The notes were not a substantially verbatim record of any statements that Agent Berretta made to the Defendant. Also, in their incomplete form they could not be statements "adopted" by Berretta. See Ramos, 27 F.3d at 70; United States v. Ammar, 714 F.2d 238, 259 (3d Cir. 1983) (finding handwritten notes or drafts must at least be shown to a supervisor before constituting a statement adopted by the author). Instead, only the Agent's later criminal referral report could be said to have been "adopted" by the Agent, and therefore constitute a "statement" under the Jencks Act. See United States v. Mora, 994 F.2d 1129, 1139 (5th Cir. 1993) (finding agent's "scattered jottings" were not "signed or otherwise adopted or approved" by the agent, and were therefore not a Jencks "statement"); Griffin, 659 F.2d at 937-38 & n.4 ("[I]f the agent later adopts or approves that portion of his notes which does not simply record the remarks of the interviewee, his act of approval is likely to attach more to his completed formal report than to the 'jottings' from which the agent drafts the report. In that event, it is the final report which becomes the Jencks Act statement and not the rough notes.") (emphasis in original). Therefore, the Court finds that the steno notes were not Jencks Act "statements," and accordingly not materials which the Government was required to

produce to the Defendant. However, even if the steno notes were producible Jencks Act materials, the Court finds that they were destroyed in good faith, and their destruction was harmless error under the circumstances of the case. See Ramos, 27 F.3d at 68-9.

4. Brady Disclosure

Finally, the Defendant argues that the loss or destruction of the steno notes constitutes a violation of the Due Process concerns of Brady v. Maryland, 373 U.S. 83 (1963) and its progeny.

Under Brady, the Government is required to make an affirmative disclosure of all material exculpatory information. See Kyles v. Whitley, 115 S.Ct. 1555, 1565 (1995). The Supreme Court has instructed that for Brady purposes impeachment evidence must be treated as exculpatory. See id. (citing United States v. Bagley, 473 U.S. 667 (1985)). Therefore, the Defendant must prove that (1) the Government withheld impeachment evidence, and (2) the evidence withheld was material. See United States v. Pelullo, 105 F.3d 117, 122-23 (3d Cir. 1997).

Before the non-disclosure or destruction of evidence can be found a violation of Due Process, it must be shown that the evidence was truly impeaching. In Ramos, the Third Circuit refused to find a Brady violation on the mere possibility that the destroyed notes contained impeachment material. See Ramos, 27 F.3d at 71. The Court continued:

> We think it unwise to infer the existence of Brady material based upon speculation alone. Instead, we favor the approach taken by the United States Court of Appeals for the Ninth circuit in Griffin, that "unless [a] defendant is able to raise at least a colorable claim that the investigator's discarded rough notes contained evidence favorable to [him] and material to his claim of innocence or applicable to his punishment--and that such exculpatory evidence has not been included in any formal interview report provided to defendant--no constitutional error of violation of due process will have been established." Griffin, 659 F.2d at 939.

Id.

In this case, like Ramos, the Defendant has failed to raise a colorable claim that the steno notes contained impeachment material that was not in the rough notes or criminal referral report actually produced. On cross examination, counsel for the Defendant drew out the fact that Agent Berretta had not recorded--in either her rough notes or criminal referral--that she had specifically informed the Defendant of her failure to file tax returns for the years 1990-92. (Tr. at 119-22 (6/3/97) (Berretta)). In her Motion, the Defendant claims that the steno notes would similarly lack any reference to specifically informing the Defendant of the violations. (See Def.'s Reply Mem. at 3). However, the Defendant fails to articulate how the steno notes would provide any impeachment material different or more effective than that actually used in cross-examination. See Ramos, 27 F.3d at 71. Contrary to the Defendant's suggestion, Agent Berretta testified to notifying the Defendant of the violations from present recollection, not from her missing steno notes. (Tr. at 111-12 (6/3/97) (Berretta)). Therefore, although

the Defendant insists that the steno notes contained additional impeachment material, her claim is purely speculative.

To prove a Brady violation, the Defendant must also show that the destroyed evidence was material to her defense. See Kyles, 115 S.Ct. at 1565-67. Destroyed evidence is material if its suppression undermines confidence in the outcome of the trial. See Id. at 1566. Accordingly, the question in the present case is whether the Government's failure to preserve and disclose the steno notes had such an effect on the trial as a whole as to render the verdict unworthy of trust. See Pelullo, 105 F.3d at 123.

As the earlier excerpts from the trial transcript demonstrate, the absence of the steno notes had no meaningful effect on the fairness of the trial. Their destruction, while improper, does not in any way render the outcome of this case questionable. Therefore, the Court finds that the steno notes were not material.

III. Motion For a New Trial

The Defendant also moves for a new trial under Rule 33 of the Federal Rules of Criminal Procedure on four grounds: (1) the Government's nondisclosure of Agent Berretta's steno notes requires a new trial; (2) the Court erred in declining to charge the jury on the defense theory of the case; (3) the Court erred in giving the jury a supplemental "modified" Allen charge; and

(4) the Court erred in charging the jury with the Government's "Deliberate Ignorance" instruction.

Under Rule 33, the Court may grant a new trial "if required in the interest of justice." Fed. R. Crim. P. 33. It is a remedy to be used only in exceptional cases, where the evidence weighs heavily against the verdict, or failure to grant a new trial would result in a miscarriage of justice. See Government of the Virgin Islands v. Commissiong, 706 F. Supp. 1172, 1183-84 (D.V.I. 1989); see also United States v. Fleming, 818 F. Supp. 845, 846 (E.D. Pa. 1993). Therefore, the decision whether to grant a new trial is within the sound discretion of the district court. See United States v. Mastro, 570 F. Supp. 1388, 1390 (E.D. Pa. 1983). With this standard in mind, the Court will consider each of the Defendant's contentions in turn.

A. Destruction of Berretta's Steno Notes

Breuer argues that the destruction of the Agent Berretta's steno notes was so prejudicial that she is for that reason alone entitled to a new trial. The Court's reasoning in rejecting the Defendant's Motion for Judgment of Acquittal applies with the same force to Defendant's Motion for a New Trial. The Court finds that the steno notes were neither material nor impeaching, and their inadvertent destruction did not effect the probability of a different result. See Kyles v. Whitley, 115 S.Ct. 1555, 1566 (1995). Therefore, the Motion for a New Trial is denied on these grounds.

B. Defense Theory of the Case

The Defendant next argues that she is entitled to a new trial because the court erred in failing to instruct the jury on her theory of the case, namely that a finding that the Defendant believed her husband had filed the tax returns for the years charged would negate willfullness and make out a complete defense. (See Def.'s Mot. at App. 5).

It is within the discretion of the Court to refuse to give a jury instruction. See United States v. Gross, 961 F.2d 1097, 1101 (3d Cir. 1992). The Court is free to refuse a proposed instruction unless the instruction is correct, not substantially covered by other instructions, and so important that its omission prejudiced the defendant. See United States v. Smith, 789 F.2d 196, 204 (3d Cir. 1986).

The instructions given to the jury adequately covered the element of willfullness, on which the Defendant built her case. Therefore, it was unnecessary that the Court give the jury the proposed instruction. See United States v. Frey, 42 F.3d 795, 800-01 (3d Cir. 1994) (stating that "even if the evidence supports defendants; theories of defense, the court will examine the district court's instructions as a whole to determine whether they adequately presented these theories of defense to the jury"). Further, as the Court explained when rejecting it at the charge conference, the Defendant's proposed supplemental instruction was argumentative. (Tr. at 157 (6/3/97)). It would have been inappropriate for the Court to give such a charge.

Instead, it was more appropriate for the Defendant to suggest this in her closing argument, which she did. (Tr. at 27-30 (6/5/97)). Therefore, Defendant's Motion is denied on this ground.

C. The Supplemental Instruction

The Defendant also argues that the Court's supplemental charge to the jury was an inappropriate "Allen charge," so prejudicial as to entitle her to a new trial.

On the second day of deliberations, the jury reported an impasse. To assist the jury in making its decision, the Court gave the following instruction:

> Ladies and gentlemen of the jury, I'm advised that you have reached an impasse and I'm going to ask you to continue your deliberations in an effort to reach an agreement, and I want to make a few comments about that.
>
> This is an important case. The trial has been expensive in time, it's been expensive in effort. It's an emotional strain, it's costly for both the defense and the prosecution. If you should fail to agree upon a verdict, the case will be left open and may have to be tried again. Obviously, another trial would only serve to increase the costs of both sides, and there's no reason to believe that the case can be tried again by either side any better or more exhaustively than it has been tried to you
>
> Any future jury must be selected in the same way that you were selected, from the same sources. And there's no reason to believe that the case could ever be submitted to 12 people who are more conscientious than you are, who are more impartial than you are and who are more competent than you are to decide it. And I doubt very seriously whether the evidence will be more abundant or clear than has been produced this week.
>
> If a majority of you are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one, since it appears to make no effective impression on the minds of others. On the other hand, those of you who are in favor of acquittal, the rest of you should ask yourselves again and more thoughtfully whether you should accept the weight and sufficiency of the evidence which obviously fails to convince your fellow jurors beyond a reasonable doubt.
>
> Remember, however, that at no time is a juror expected to give up his or her honest belief as to the weight affecting the evidence, but after full deliberation and consideration of the evidence, it is your duty to agree upon the verdict if you can do so.
>
> You must remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt, the defendant should have a unanimous verdict of not guilty.
>
> I'll ask you to retire once again with these thoughts in mind and continue your deliberations in conjunction with the other instructions that I previously gave to you.

(Tr. at 2-3 (6/6/97).

The Court rejects the Defendant's characterization of the foregoing instruction as a "modified Allen charge."[8] The Defendant cites no authority that establishes that the Court's supplemental instruction was improper. Therefore, the Defendant's Motion is denied on this ground as well.

D. The Deliberate Ignorance Instruction

Finally, the Defendant argues that it was prejudicial error to give the Government's instruction as to deliberate ignorance. The instruction stated:

> The Government may prove that the Defendant acted knowingly by proving, beyond a reasonable doubt, that this Defendant deliberately closed her eyes to what would otherwise have been obvious to her. No one can avoid responsibility for a crime by deliberately ignoring what is obvious. A finding beyond a reasonable doubt of an intent of the defendant to avoid knowledge or enlightenment would permit, you the jury, to infer knowledge. Stated another way, a defendant's knowledge of a particular fact may be inferred from a deliberate or intentional blindness to the existence of that fact.
>
> It is, of course, entirely up to you whether you find any deliberate ignorance or deliberate closing of the eyes and the inferences to be drawn from any such evidence. You may not infer that a defendant had knowledge, however, from proof of a mistake, negligence, carelessness or a belief in an inaccurate proposition.

(Tr. at 83 (6/5/97)).

A jury instruction on deliberate ignorance is appropriate in a section 7203 case, such as this one, where the

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[8] An Allen charge, named for the case of Allen v. United States, 164 U.S. 492 (1896), in which the Supreme Court approved it, is a jury instruction designed to coerce the jury into unanimity. See United States v. Fiorvanti, 412 F.2d 407, 416-17. The charge asks jurors in the minority to question their views for no reason other than that they are in the minority. For example, the jury charge at issue in Fiorvanti instructed the jurors to "listen with deference to arguments of fellow-jurors and distrust of [sic] his own judgment if he finds a large majority of the jury taking a different view of the case from that what he does, himself." Id. at 415.

defendant claims a lack of guilty knowledge and the evidence at trial supports an inference of deliberate indifference. See United States v. Wisenbaker, 14 F.3d 1022, 1027 (5th Cir. 1994) (upholding trial court's willfull blindness instruction in section 7201 prosecution); United States v. Bussey, 942 F.2d 1241, 1245-46, 1248-50 (8th cir.) (section 7203 prosecution), cert. denied, 504 U.S. 908 (1991); United States v. Bissell, 594 F. Supp. 903, 923-25 (D.N.J. 1997) (section 7206 prosecution). In assessing the propriety of the instruction, the evidence must be viewed in the light most favorable to the government. See United States v. Fingado, 934 F.2d 1163, 1166-67 (10th Cir.) (finding sufficient evidence to support the instruction in s. 7203 case), cert. denied, 502 U.S. 916 (1991).

The circumstances of the present case warranted the deliberate ignorance instruction. The Defendant's main theory of defense was that her husband handled all of the family's financial and tax affairs, and therefore she was unaware of her husband's failure to file joint tax returns on her behalf for at least three tax years. The Government produced evidence that Agent Berretta had contacted the Breuers for their tax returns continually for many months, including three conversations with the Defendant herself. Considering these facts in the light most favorable to the Government, the Defendant had every reason to know that she had failed to file her returns. Because she argued an "innocent spouse" defense to the jury, the Government was entitled to an instruction that deliberate ignorance on her part

could satisfy the element of willfullness. Therefore, the Defendant's Motion for a New Trial is denied on this final ground as well.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
BARBARA BREUER	:	NO. 97-0082-02

O R D E R

AND NOW, this 12th day of September, 1997, upon consideration of the Defendant Barbara Breuer's Motion for a Judgment of Acquittal and for a New Trial, IT IS HEREBY ORDERED that the Defendant's Motion is **DENIED**.

BY THE COURT:

_____
HERBERT J. HUTTON, J.